



bcuc
British Columbia
Utilities Commission

Suite 410, 900 Howe Street
Vancouver, BC Canada V6Z 2N3
bcuc.com

P: 604.660.4700
TF: 1.800.663.1385
F: 604.660.1102

CB Powerline Ltd.

Application for an Exemption from Part 3 of the *Utilities Commission Act*, pursuant to section 88(3)

Decision
and Order G-71-20

March 31, 2020

Before:

T. A. Loski, Panel Chair
C. Brewer, Commissioner
W. M. Everett, QC, Commissioner

TABLE OF CONTENTS

Page no.

| | | |
|------------|---------------------------------------|-----------|
| 1.0 | INTRODUCTION | 1 |
| 1.1 | Background..... | 1 |
| 1.2 | Approval Sought | 2 |
| 1.3 | Regulatory Process | 2 |
| 1.4 | Decision Outline | 2 |
| 2.0 | REQUEST FOR EXEMPTION | 2 |
| 2.1 | Jurisdiction..... | 2 |
| 2.2 | Exemption from Part 3 of the UCA..... | 3 |
| 3.0 | ISSUES | 6 |
| 3.1 | Financial Viability..... | 6 |
| 3.2 | Long-term Viability | 8 |
| 3.3 | Fairness of Rates..... | 10 |
| 3.4 | Public Safety | 11 |
| 3.5 | Adequacy of Consultation | 13 |
| 4.0 | CONCLUSION | 14 |
| 4.1 | Project Alternatives | 15 |
| 4.2 | Compliance with the UCA..... | 15 |

COMMISSION ORDER G-71-20

APPENDICES

| | |
|-------------------|-----------------------|
| APPENDIX A | Glossary and Acronyms |
| APPENDIX B | Exhibit List |

1.0 INTRODUCTION

1.1 Background

On June 13, 2019, the British Columbia Utilities Commission (BCUC) received an application from CB Powerline Ltd. (CBP) under section 88(3) of the *Utilities Commissions Act* (UCA),¹ for an exemption from Part 3 of the UCA with respect to CBP's intention to supply electricity to Cosens Bay, Regional District of North Okanagan, British Columbia (Application). The following is the Panel's decision regarding the Application.

The Cosens Bay community has never had an electrical service supplied by a third-party service provider. The Cosens Bay area is surrounded by a provincial park and lake, and is not readily accessible to electrical distribution utilities due to its distinct geographical nature. Currently the community relies on the use of fossil fuel fired generators and, to a lesser degree, residential solar power for electrical generation.²

CBP is a community member founded corporation established to operate as a not-for-profit entity.³ CBP states that its "sole purpose is to undertake electricity supply to Cosens Bay."⁴ The community of Cosens Bay is comprised of approximately 100 land parcels, with an estimated 75 homes built thereon.⁵ Forty eight community members (Buyers) have entered into Power Purchase Agreements (PPA), for a total of 55 PPAs signed, and Shareholder Agreements with CBP to receive electricity.⁶ The forty eight Buyers are landowners representing 54 land parcels within Cosens Bay, as a number of Buyers own multiple land parcels. One land parcel has two PPAs associated with it, which is allowed under the structure established by CBP.⁷ Volunteer directors from the Cosens Bay community will oversee the governance and management of CBP.

CBP is not an electricity generator. It must, therefore, source an electrical supply from the British Columbia Hydro and Power Authority (BC Hydro) or another electricity generator. CBP intends to apply to BC Hydro for a customer owned Primary Service Connection and to construct and operate a community-specific electricity delivery system to Cosens Bay (the Project).⁸

CBP intends to design, construct and operate a utility for the provision of electric service to the community of Cosens Bay, including overhead, submarine and underground 25 kV power lines, transformers, secondary service cables, fibre optic cables and revenue meters.⁹

Prior to taking on the Project itself, CBP separately explored a number of alternative options with FortisBC Inc. (FBC) and with BC Hydro, both electricity generators in the area. However, to date CBP could not find an

¹ *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

² Exhibit B-1, p. 5.

³ *Ibid.*, p. 4.

⁴ *Ibid.*

⁵ *Ibid.*, p. 5.

⁶ Exhibit B-2, BCUC IR 2.3. For clarity, 55 common share certificates were issued to the 48 participating landowners; each common share representing the 55 PPAs that have been signed.

⁷ Exhibit B-2, BCUC IR 2.3.

⁸ Exhibit B-1, p. 4.

⁹ *Ibid.*, pp. 4-5.

acceptable option with either FBC or BC Hydro.¹⁰ As a result, CBP decided to undertake the Project independently as a community owned corporation.¹¹

1.2 Approval Sought

CBP has applied for an exemption from all of Part 3 of the UCA, pursuant to section 88(3) of the UCA with respect to the provision of electricity supply to power the community of Cosens Bay.¹²

Under section 88(3) of the UCA, the BCUC may, with the advance approval of the Minister responsible for the administration of the *Hydro and Power Authority Act*, exempt a person from the application of any or all provisions of the UCA.

1.3 Regulatory Process

By Order G-151-19 dated July 8, 2019, the BCUC initiated a written hearing process and established a regulatory timetable for review of the Application. This included one round of BCUC information requests (IRs), one round of intervener IRs, and CBP's responses to IRs.

BC Hydro and FBC intervened in the proceeding and actively participated. Greg Sunell registered as an interested party and one letter of comment was received from Donald Flintoff.

Following CBP's response to IRs on October 3, 2019, the BCUC amended the regulatory timetable by Order G-253-19 dated October 23, 2019. The amended timetable included one round of BCUC IRs to BC Hydro, a second round of BCUC and intervener IRs to CBP, CBP's responses to IRs, and arguments. Final arguments were received from CBP, BC Hydro and FBC in January 2020. CBP filed its reply argument on February 11, 2020.

1.4 Decision Outline

This decision considers CBP's request for an exemption under the UCA and involves a discussion of the issues identified in the proceeding. This decision concludes with a consideration of the possible next steps for CBP, while also outlining the necessary requirements for it to comply with the UCA.

2.0 REQUEST FOR EXEMPTION

2.1 Jurisdiction

Section 1 of the UCA defines public utility as follows:

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, ...

¹⁰ Exhibit B-1, p. 7.

¹¹ Ibid., p. 7.

¹² Exhibit B-1, p. 2.

CBP acknowledges that its proposed ownership and operation of a utility for the provision of electricity to the community of Cosens Bay would fall within the foregoing definition of a public utility under the UCA.¹³

Panel Determination

The Panel finds that CBP's proposed ownership and operation of a utility for the provision of electricity services to the community of Cosens Bay for compensation would constitute a public utility as defined under the UCA.

2.2 Exemption from Part 3 of the UCA

The test for granting a section 88(3) exemption order is found in the Reasons for Decision attached to BCUC Order G-167-07,¹⁴ and set out in BCUC Order G-41-06, which states that "a section 88(3) exemption order should be issued, with the advance approval of the LGIC [Lieutenant Governor in Council], when such exemption serves the objects and purposes of the Act and it is in the public interest to do so."¹⁵

Position of the Parties

CBP

CBP states that comprehensive regulation under Part 3 of the UCA is unnecessary.¹⁶ CBP contends that comprehensive regulation would result in increased costs to the Project's Buyers, as CBP would likely use third party contractors to comply with the requirements under Part 3 of the UCA.¹⁷

CBP submits that the development and application of the Shareholders Agreement and PPA documents have been shown to be fair, just, and reasonable. As described in more detail later, the agreements provide for funding of CBP from three series of Buyers with the price of participating being set at \$50,000 for the Series 1 Buyers on the basis they are taking on the highest risk and the price increasing for subsequent Series 2 and 3 Buyers as the Project is built and the risk diminishes. CBP argues that as a self-governed not-for-profit corporation, established within a constrained geographical area, that the monopoly power risks typically associated with public utilities do not exist in its case.¹⁸ This is particularly so because CBP is 100% community owned, and that participation of community members is entirely voluntary and its single purpose is to provide electrical service to the community.¹⁹

CBP asserts that granting it the requested exemption would serve both the objects and purposes of the UCA and is in the public interest.²⁰

¹³ Exhibit B-1, p. 1.

¹⁴ Unocal, Application for Approval of the Disposition of its Interests in the Aitken Creek Storage Facility to its Wholly Owned Subsidiary, BCUC Order G-167-07

¹⁵ BC Hydro/FBC, Joint Application for Exemptions from the Act regarding the Canal Plan Agreement and reasons for Decision, BCUC Order G-41-06

¹⁶ Exhibit B-1, p. 13.

¹⁷ Exhibit B-2, BCUC IR 1.3

¹⁸ Exhibit B-1, p. 12.

¹⁹ CBP Final Argument, pp. 4-5.

²⁰ Exhibit B-1, p. 1.

BC Hydro

BC Hydro submits that it does not oppose CBP's exemption request.²¹ However, BC Hydro states that any exemption granted should be conditional and remain in effect until the BCUC, after a hearing or after a hearing on a complaint, orders that an exemption should no longer apply.²²

FBC

FBC states that its interest in this proceeding is to ensure that the BCUC grants exemptions only where warranted and that the public interest is protected. FBC states that, while it does not wish to stand in the way of Cosens Bay receiving an electrical service, CBP has not "demonstrated a justification for the exemption applied for."²³

FBC states that CBP has largely confined its justification for an exemption to a discussion of monopoly risk. However, FBC asserts that this ignores the fact that by granting an exemption, it would negate the requirement for CBP to file for a Certificate of Public Convenience and Necessity (CPCN). This would leave the BCUC with no oversight as to the project need, alternatives and justification, matters of public consultation, environmental matters, and the setting of rates.²⁴

FBC also states that despite CBP relying on the cost impact of active regulation as a basis for justifying its exemption request, it has not provided its estimate of the costs or the impact. In FBC's view, CBP is requesting an exemption to avoid a consequence that it has not demonstrated is necessary to avoid.²⁵ FBC submits that in this case, it cannot be determined whether the costs associated with the regulation of CBP would be significant or not.²⁶

FBC submits that "CBP should be required to exhaust all service options with BC Hydro."²⁷ Thereafter, if BC Hydro is unable to provide service to Cosens Bay, FBC supports some form of light-handed regulation or partial exemption that includes the requirement to obtain a CPCN. FBC states that any such regulation must incorporate basic financial oversight and the ability for customers to bring complaints to the BCUC for resolution.²⁸

FBC submits that CBP's application is "premature and that CBP has failed to meet its burden to qualify for a section 88(3) exemption."²⁹ In FBC's opinion, CBP has not shown that the objects and purposes of the UCA would be met if an exemption were granted, or that an exemption is in the public interest.³⁰

²¹ BCH Final Argument, p. 2.

²² Ibid.

²³ FBC Final Argument, p. 1.

²⁴ Ibid., p. 3.

²⁵ Ibid., p. 4.

²⁶ Ibid.

²⁷ Ibid., p. 1.

²⁸ Ibid., p. 1.

²⁹ Ibid., p. 9.

³⁰ Ibid.

Panel Determination

For the reasons outlined below, the Panel finds that an exemption from Part 3 of the UCA is not warranted and that CBP's application for an exemption pursuant to section 88(3) of the UCA is denied.

In determining whether to seek LGIC approval for an exemption, the Panel must consider, among other things, whether such an exemption would leave CBP in a position to exert significant monopoly power by discriminating on the basis of price or service or by withdrawing service or setting rates which are unreasonable. CBP must show that all customers will receive safe and reliable service at rates that are not unjust or unreasonable. If a monopoly exists, sufficient safeguards should be present to mitigate the monopoly risks to the ratepayer.

In CBP's view, one of the reasons for the requested exemption is that due to CBP being community owned, no monopoly power risk arises. However, the Panel is concerned that there are monopoly power risks present due to the nature of CBP's Project. For example, CBP may be able to exert monopoly power by setting upfront participation fees for receiving service which are discriminatory (see subsection 3.3). There may also be occasions when CBP's interests are distinct from certain customer interests, and this could lead to abuse of monopoly power especially if customers lack a proper means for recourse.

The Panel notes that such risks are not adequately safeguarded against through CBP's dispute resolution process which is set out under section 13 of the PPA.³¹ While CBP has established a dispute resolution process under the PPA, the Panel is not confident that it is sufficiently robust nor is there an adequate customer complaints process. CBP has a two-step dispute resolution process which begins with an attempt between the Buyer and CBP to resolve the issue raised, and if this is unsuccessful then a non-binding mediation may take place. The Panel is skeptical about the effectiveness of a discretionary form of non-binding mediation in successfully resolving disputes between CBP and its customers.

The Panel is also concerned that CBP does not see the need for the BCUC to have a role in the dispute resolution process.³² As part of its oversight responsibilities in regulating public utilities, the BCUC also acts as an impartial decision maker providing an avenue of recourse for complainants. The Panel is not convinced that there is adequate recourse available to CBP's customers under the current dispute resolution model proposed by CBP.

Another reason put forward by CBP for requesting an exemption from Part 3 of the UCA is that the cost of regulation would be burdensome to its customers. CBP has not provided any estimates for the cost of regulation without which, the Panel cannot determine the potential impact. The Panel is not convinced that the regulatory oversight under Part 3 of the UCA would pose a significant cost burden to the customers of CBP. Therefore, the impact of the regulatory costs envisaged by CBP is not sufficiently demonstrated to outweigh the benefits of active regulation under Part 3 of the UCA.

A further issue is that an exemption from Part 3 of the UCA would eliminate the requirement of a CPCN that CBP would otherwise be required to obtain. CBP would normally be required to obtain the CPCN from the BCUC prior to the construction or operation of a public utility system. The Panel notes that an exemption should only be granted in circumstances where the same level of standards required under a CPCN can be met. The Panel will

³¹ Exhibit B-1, Attachment A-1, p. 10.

³² Exhibit B-2, BCUC IR 2.11.3.

consider these standards to ensure that it is in the public interest for CBP to build and operate a system and that any requirements are adequately addressed.

When considering a CPCN application the BCUC assesses, in part, the evidence of the financial and technical capacity of the applicant and other persons involved, if any, to undertake and operate a project. The BCUC also assesses the public utilities' ability to ensure the safe and reliable operation of any such project. The Panel is not satisfied that the conditions are present in this Application to indicate that the requirements under a CPCN would otherwise be met.

The Panel has identified several additional issues with CBP's Application:

- the financial viability of the Project;
- the long-term viability of the Project;
- fairness of rates;
- public safety; and
- the adequacy of consultation with First Nations.

The foregoing issues are considered separately in the sections below.

3.0 ISSUES

3.1 Financial Viability

CBP's Position

CBP states that a capital budget of \$2,650,000 was approved by the Buyers on September 3, 2019.³³ CBP explains that the capital commitment of the Buyers is \$2,793,500, which covers the approved capital budget plus an excess of \$143,500. CBP states that within the capital budget, there is a contingency of \$54,553 for unforeseen costs which may arise during construction, in addition to CBP's \$50,000 working capital allowance.³⁴

CBP confirms that the Project has firm quotations to support the key equipment costs. In CBP's view, as there is only a low risk that the price of other budget items will see any significant increases, a contingency is only required for the installation portion of the project estimate.³⁵

If construction costs exceed the Buyer's funding commitments, CBP states that it has proactively discussed with willing Buyers a plan to lend the necessary funding shortfall to CBP, with repayment guaranteed from future participants signing up as Series 3 Buyers.³⁶ Series 3 Buyers are landowners who enter into the PPA and Shareholders Agreement subsequent to the Project achieving commercial operation and will be required to provide an upfront participation fee of \$100,000.³⁷ Based upon these discussions, CBP states that it is confident

³³ Exhibit B-5, BCUC IR 36.5.

³⁴ Ibid.

³⁵ Ibid., BCUC IR 36.3.

³⁶ Ibid., BCUC IR 36.5.

³⁷ Ibid., BCUC IR 36.8.

that there are enough Buyers with the financial means and the motivation to ensure any unlikely cost overruns above the capital commitments can be funded.³⁸

CBP explains that Series 1 Buyers make up 54 of the 55 PPAs signed with CBP to participate in the Project.³⁹ As set out in the PPA, Series 1 Buyers have undertaken a \$50,000 commitment to fund the project. CBP explains that the \$50,000 funding commitment was “decided upon in 2017 at a community meeting; simply as a maximum, reasonable threshold that the Cosens Bay landowners could possibly afford.”⁴⁰

CBP asserts it has demonstrated that the Project is sustainable over the long term and is capable of meeting its purpose of delivering electricity to Cosens Bay by:

- designing the Project to utility standards that will match the load forecast for all 100 lots of Cosens Bay;
- securing 55 Shareholder Agreements and PPAs (which includes funding sufficient to support the anticipated Project development activities);
- discussing securing loans from specific Buyers who could support construction cost overruns; and
- maintaining a reserve to protect Buyers against any rate shock and support minor capital expenditures during the operations phase.⁴¹

BC Hydro's Estimates

During the information request process, the BCUC asked BC Hydro to estimate its cost of providing an electricity service to the Cosens Bay community. BC Hydro states that it completed conceptual level estimates for the construction cost of the supply options that CBP put forward to BC Hydro.⁴² Conceptual level estimates have a range of accuracy of -50 percent to +200 percent. BC Hydro submits that detailed design work would be required to determine more defined cost estimates for it to provide service to the Cosens Bay community.⁴³

BC Hydro estimates that the cost of providing a service with a BC Hydro engineered submarine cable under Kalamalka Lake would be \$8.0 million (Lake Option). This is based on the routing proposed by CBP. Given the stated accuracy range of BC Hydro's estimate, costs may therefore lie within the range of \$4.0 million (-50%) to \$24.0 million (+200%).⁴⁴

CBP states that it is not in a position to provide any commentary on BC Hydro's concept level cost estimate, other than to point out that it is only a concept estimate.⁴⁵

Panel Discussion

The Panel is concerned that CBP has underestimated the Project costs. CBP's estimate appears to have been constrained by the availability of Buyers committed to contribute a “maximum, reasonable threshold” of \$50,000.⁴⁶

³⁸ Ibid., BCUC IR 36.5.

³⁹ Exhibit B-2, BCUC IR 17.4.

⁴⁰ Ibid., BCUC IR 17.5.

⁴¹ CBP Final Argument, p. 5.

⁴² Exhibit C1-3, BCUC IR 1.1.3.

⁴³ Ibid., BCUC IR 1.1.8.

⁴⁴ Ibid., BCUC IR 1.1.8.

⁴⁵ Exhibit B-5, BCUC IR 36.15.

⁴⁶ Exhibit B-2, BCUC IR 17.6.2.

The Panel notes that while provisions are made to access further funding from community members, such sources are limited. Moreover, there is a disconcerting reliance on Series 3 Buyers to meet any cost of overrun loans. This is particularly troubling in the light of CBP's own statement that "while the total number of Series 2 and Series 3 Buyers cannot be known at this time, it is plausible that there will never be sufficient Series 3 Buyers to fully repay the Series 1 Buyers (let alone the Series 2 Buyers)."⁴⁷

The Panel questions the financial viability of a Project that has access to limited funding, particularly in the face of the potential for rising costs greater than those forecast. In this regard, the Panel notes the disparity between CBP's estimate and the concept estimate provided by BC Hydro.

The Panel is not convinced that CBP has factored all appropriate costs into the Project. There is clearly an issue around unexploded ordinance (discussed in more detail in subsection [3.4](#)) which is relevant to the Project and which has a real potential to impact costs. Research, examination and additionally the potential treatment or mitigation of risks, will all carry additional costs and have not been adequately addressed by CBP. As BC Hydro notes such undertakings can be very expensive.⁴⁸

Accordingly, the Panel is not satisfied with the cost estimates provided and is also concerned that the loan repayments discussed would pose a significant risk to customers.

3.2 Long-term Viability

The Panel has concerns regarding the long-term viability of CBP's Project. This includes the long-term operational plans and intended management of the Project.

Position of the Parties

CBP

CBP states that "in order to assist the on-going safe and reliable operation of the Project, officers/directors will be supported with third-party expertise. This expertise will, among others, support the day-to-day engineering and maintenance needs as well as accounting and administrative purposes."⁴⁹

Section 2.3 of the Shareholders' Agreement states that the corporation shall have up to five directors. CBP states that it does not have any employees, nor are any contemplated. It is CBP's view that this structure, and associated number of directors, is sufficient for it to function effectively.⁵⁰ CBP submits that "a turnover of existing owners (e.g., by sale or inheritance) will provide a pool of additional talent available to assist in comprising the board of directors."⁵¹ CBP believes that the present pool of 48 Buyers will grow (i.e. as Series 2 and 3 Buyers are added).⁵²

In CBP's view the reliance on volunteer directors from the Cosens Bay community presents little risk to the corporation. CBP points to the fact that within the pool of participating landowners there are individuals with

⁴⁷ Exhibit B-5, BCUC IR 36.12.

⁴⁸ Exhibit C1-3, BCUC IR 1.2.5.

⁴⁹ Exhibit B-5, BCUC IR 20.6.

⁵⁰ Exhibit B-2, BCUC IR 3.4.

⁵¹ Exhibit B-5, BCUC IR 20.3.

⁵² Ibid., BCUC IR 20.3.

experience in engineering, construction, finance, accounting, and management.⁵³ In CBP's opinion, using the skills of directors, coupled with the retention of third-party expertise, is a reasonable and practicable approach towards ensuring the safe and reliable operation of the Project.⁵⁴

CBP intends to retain third party contractors for the everyday running of the system while directors will oversee this process.⁵⁵ CBP states that at this stage of the Project (i.e. design and development) it has not yet arranged third party assistance for operating and maintaining the system.⁵⁶

CBP also states that no forecasts for the annual maintenance, administrative and operating costs have been made at this time. CBP contends that as costs will depend on actual time spent on these activities they cannot be forecasted with any accuracy.⁵⁷

FBC

FBC submits that "the evidence in this proceeding provides an insufficient basis from which to determine whether CBP has adequate resources and expertise to operate its utility in a manner that provides its customers with service that is safe, adequate and fair at just and reasonable rates."⁵⁸

Panel Discussion

On the basis of the evidence produced, the Panel is not satisfied with the long-term operational plans and management of CBP's Project.

The Panel finds that a reliance on an assumption that volunteer directors will have both the right skill sets and the required availability, is a highly uncertain basis for Project sustainability. This is exacerbated by the fact that not all those involved in the current direction of the corporation are full time residents. This vulnerability is starker in the absence of any plans to engage experienced and qualified staff.

The Panel anticipates that the maintenance and operation of the utility promoted by CBP could quickly become problematic and even unsustainable given its dependence on the availability of volunteer directors with the necessary experience, skill and expertise to oversee the utility. This over dependence on community resources (which may not always be forthcoming or appropriately qualified) and the reliance on accessing external expertise via third party contracts could negatively impact CBP's ability to properly control costs or to respond to emergencies and ensure the overall safety of the Project (see subsection [3.4](#) for a discussion on public safety).

In addition to the above, the Panel finds CBP's inability to forecast operating expenses problematic, as making adequate provision to meet these costs is clearly critical to the long-term viability of the Project. Vulnerability increases as the potential financial burden required to sustain the Project will rest on a discrete and limited customer base with Buyers "responsible for all costs associated with the operation, maintenance, emergency repairs or losses of the distribution system that may arise..."⁵⁹

⁵³ Exhibit B-2, BCUC IR 3.4.1.

⁵⁴ Exhibit B-5, BCUC IR 20.6.1.

⁵⁵ Ibid., BCUC IR 20.4.

⁵⁶ Exhibit B-2, BCUC IR 3.8.

⁵⁷ Ibid., BCUC IR 18.4.

⁵⁸ FBC Final Argument, p. 3.

⁵⁹ Exhibit B-2, BCUC IR 18.11.

The Panel notes that CBP estimates its customer base will grow by 2 customers per year for 20 years.⁶⁰ This anticipation of current non-participants joining the project (following Buyer electrification) appears unrealistic, as to join at a later date would result in significantly increased entry fee costs. The addition of up to 40 customers would require CBP to capture most of the remainder of the Cosens Bay community, who at this stage have not signed up for the Project. Even with a turnover of residents, the Panel recognizes that the likelihood of such a large number of customers joining the Project (for an upfront participation fee of \$100,000) seems unlikely and there is no evidence to support this. The Panel is therefore skeptical that the growth forecasted can be realistically achieved.

3.3 Fairness of Rates

CBP seeks, in part, that it be exempted from rate and financial oversight. In particular, sections 59 to 61 of the UCA (which provide the BCUC with authority to regulate rates) would cease to apply.

As set out in section 59 of the UCA, a public utility must not make, demand or receive an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided.

CBP's Position

CBP states that “with the exception of entry-timing related costs, terms and conditions for electrical service are the same for all participants (regardless of entry timing); the structure of documents ensure a non-discriminatory form of agreement for all participants.”⁶¹ Further, CBP states it will “provide all participants with the same terms and conditions for electrical supply, avoiding unjust, unreasonable, or discriminatory rates as well as discriminatory or preferential terms and conditions.”⁶²

CBP identified three series of Buyers to reflect distinct points of Project risk. CBP states that the highest risk is faced by the Series 1 Buyers. This is the group that supported the Project concept from the beginning. Series 2 Buyers are those who sign up during the permitting and construction phase which carries lesser financial risks. CBP identifies Series 3 Buyers as those landowners who enter the Project after the permitting and construction risk has gone.⁶³

In CBP's view, the model chosen reflects the degree of risk to which stakeholders are exposed. Those investing early in the scheme shoulder the greatest risk of losing their investment and so are asked to contribute a lesser sum than later joiners whose risks are diminished. The investment amounts for Series 1, 2 and 3 Buyers sit at upper levels of \$50,000, \$90,000 and \$100,000 respectively (with funding caps for Series 1 and 2 Buyers and an upfront fee for Series 3 Buyers). CBP states that “these amounts were determined by CBP, following community consultation, to be fair and reasonable given all the landowners of Cosens Bay have been engaged, or had the opportunity to engage, with the Project from the beginning.”⁶⁴

⁶⁰ Exhibit B-2, BCUC IR 8.1.

⁶¹ CBP Final Argument, p. 2.

⁶² Ibid., p. 5.

⁶³ Exhibit B-5, BCUC IR 36.8.

⁶⁴ Ibid.

CBP states that “it is important to remember the Project is being designed and built to support the full electrical load of the 100 lots within Cosens Bay. This means that the Series 1 Buyers are fronting these costs towards the future benefit of the Series 2 and 3 Buyers.”⁶⁵

CBP submits that a repayment structure was established by CBP to compensate the early Buyers (i.e., Series 1, then Series 2) for taking on development and construction risk (which the Series 3 Buyers are not taking).

It is CBP’s position that “as demonstrated in the original application, and subsequent IRs, the development and application of the Shareholders Agreement and PPA documents have been shown to be fair, just, and reasonable.”⁶⁶

Panel Discussion

The Panel is not persuaded that the rates to be paid by Buyers under the terms of their agreements with CBP are fair, just and reasonable. The Panel is concerned by the discrepancies between Buyer participation fees. While the rationale for rewarding early investors in the Project with lower fees is understandable, it does not justify the terms offered to subsequent Buyers and, in particular to the terms offered to Series 3 Buyers. The terms for the Series 3 Buyers are substantially different and would be disadvantageous to those Series 3 Buyers wishing to receive service from CBP.

The variations in price cannot be justified based on risk levels alone, given that there is provision for repayment to those participating early in the Project, where risks are deemed highest, but not to those who join at the final stage. The existence of such provisions within the Shareholders Agreement enable discretionary payments to be made to Series 1 and to 2 Buyers. However, there is no provision for any reimbursement to Series 3 Buyers.

Series 3 Buyers appear to be particularly disadvantaged, unlike others, as they are not eligible to benefit from a funding cap but rather must pay an upfront participation fee of \$100,000. Moreover, it is possible that the quantum of payment sought from Series 3 Buyers has been inflated in order to repay the costs of any loans which may be sought from Series 1 Buyers, or to build up capital reserves at Series 3 Buyers’ expense.⁶⁷ Also, Series 3 Buyers who may have joined the community at a later date, would not have had the opportunity for involvement in the community consultation sessions in which the Buyer tiers were discussed and agreed upon.

For these reasons, the Panel is not satisfied that customers will receive service under similar circumstances without undue prejudice or disadvantage.

3.4 Public Safety

The BCUC has a duty to ensure that public utilities provide safe and reliable services including the safety of the general public as well as the safety of those persons operating and using those services. The evidence has disclosed concerns regarding the possibility of unexploded ordinance (UXO) in or around Cosens Bay due to the area’s historical use.⁶⁸

Position of the Parties

⁶⁵ Exhibit B-5, BCUC IR 36.8.

⁶⁶ CBP Final Argument, p. 2.

⁶⁷ Exhibit B-5, BCUC IR 36.5.

⁶⁸ Exhibit C1-3, BCUC IR 1.2.5.

CBP states that it has worked with a member of the Department of National Defence (DND) to ascertain whether there exists any risk to the Project from UXO.⁶⁹ The information received states that:

Cosens Bay beach and ridge areas at the end of the bay were used extensively in WW [World War] II as a mortar range for beach head training. There have been historic findings in the immediate area of the beach, within 200 meters of the beach area, up into the adjacent ridge line, and in the field within the provincial park. No UXOs have ever been found outside of the park boundary on Cosens Bay Road or within the existing subdivision.⁷⁰

CBP states that it “will continue to engage with DND in an on-going effort to obtain as much information as possible regarding UXOs in relation to the Project area.”⁷¹ It is CBP’s understanding that the work completed to date with the DND indicates that the lake area and land routes proposed for the Project are not in areas used for WW II training.⁷²

In CBP’s opinion, the information received from DND indicates the risks to be very low to nonexistent for the Project area.⁷³

BC Hydro

BC Hydro states that “a number of sites around Vernon are or were under the control of the DND, and they have historically been used for various training exercises. DND has assessed a number of sites as high risk for finding UXOs, which are military explosives that did not function as intended.”⁷⁴ BC Hydro states that, amongst other things, it would need to be confident that the risk of UXOs was mitigated before it would consider taking a role in CBP’s Project, such as taking over the submarine cable.⁷⁵ BC Hydro notes it has experience with mitigation of UXO risks on land, but it does not have such experience underwater. From BC Hydro’s experience, UXO treatment can be very expensive.⁷⁶

BC Hydro provides two examples of the impact of UXOs on cost, stating that a recent pole renewal in a UXO area increased the cost from \$20k to \$27.3k (36.5 per cent increase in costs) and a system improvement in a UXO area increased the cost from \$5.3M to \$6.5M (22 per cent increase in costs).⁷⁷

BC Hydro states it has also not been able to fully assess whether the Lake Option is safe, because the risk of UXOs near and under the lake has not been fully assessed by DND.⁷⁸ BC Hydro states that it would need to “consider whether providing service to the Cosens Bay community with the Lake Option is safe, efficient, fair and reasonable” and this would include assessing the risk of UXO.⁷⁹

⁶⁹ CBP Final Argument, p. 4.

⁷⁰ Exhibit B-5, BCUC IR 35.1.

⁷¹ Ibid., BCUC IR 35.3.1.

⁷² Ibid., BCUC IR 35.2.

⁷³ Ibid., BCUC IR 35.3.1.

⁷⁴ Exhibit C1-3, BCUC IR 1.2.5.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid., footnote 1.

⁷⁸ Ibid., BCUC IR 1.3.3.

⁷⁹ Ibid., BCUC IR 1.1.3.

FBC

FBC states that CBP has not provided adequate information to address various unresolved issues and questions as they relate to the design of the Project. One of the unresolved issues FBC raises is the likely presence of UXO in proximity to the Project area.⁸⁰

Panel Discussion

The Panel is concerned that CBP appears to have failed to sufficiently examine the potential impact to public safety presented by the existence of UXOs in the Cosens Bay area. The risk to public safety remains unknown as CBP's limited engagement with the DND cannot substitute for a more robust examination and assessment of the risks.

CBP has not considered what problems may arise from the existence of UXO or specified what control measures it proposes in such circumstances. In consequence, the level of risk to the construction of the Project and persons providing and receiving services is largely unexplored and gives rise to considerable apprehension that no provision has been made to assess or address potential risk.

As discussed in subsection [3.2](#) of this decision, the Panel is concerned that the maintenance and operation of the Project by CBP could become problematic and unsustainable due to a lack of necessary experience, skill and expertise. The Panel is concerned that CBP's reliance on volunteers and third-party contracts is likely to impede its ability to adequately manage the safety of the proposed system including any emergency responses. This concern extends to the management and potential mitigation of UXO.

The Panel is of the view that the risks posed to the Project and the lack of experience, skill and expertise to adequately manage these risks, including the current risk of UXO and the long-term operational concerns discussed, present an unacceptable level of risk to public safety.

3.5 Adequacy of Consultation

Section 3 of the BCUC's CPCN Guidelines specifically requires project proponents to identify any First Nations potentially affected by their applications, including any feasible project alternatives and to consult accordingly. As discussed throughout this decision, the requirements related to a CPCN can be taken into account when looking at an exemption request from Part 3 of the UCA. Therefore, the Panel addresses below the adequacy of CBP's consultation efforts with First Nations up to the point of this decision.

Position of the Parties

CBP

CBP states that it understands that only the Crown can consult and therefore any consultation should be carried out by the Crown.⁸¹ CBP met with The Ministry of Forests, Lands, Natural Resource Operations and Rural Development and understood that that the Crown would lead all consultation efforts, with CBP as the proponent leading any requisite engagement activities.⁸²

⁸⁰ FBC Final Argument, p. 6.

⁸¹ Exhibit B-2, BCUC IR 6.1.

⁸² Ibid.

CBP states it has proactively conducted a review of First Nations in the area to help assess which Indigenous communities may be potentially affected by the Project. Specifically, CBP reviewed the Front Counter BC Crown Land Tenure Application Portal website, including the Consultative Areas Database (CAD). CBP states that the result of CAD “did not identify any First Nations in the immediate project area.”⁸³

CBP explains that it expanded its consideration to the closest First Nation to the Project, the Okanagan Indian Band (OIB). CBP states it has proactively engaged with the OIB and actively continued to reach out. However, no specific issues or concerns have been raised by the OIB to date.⁸⁴ CBP states that it is not aware of any consultation undertaken by the Crown nor has it received any response from the OIB to CBP emails.⁸⁵

BC Hydro

BC Hydro identified consultation with First Nations as a potential issue with the Project.⁸⁶

Panel Discussion

The Panel acknowledges the degree of public consultation which CBP has undertaken within the community of Cosens Bay. This includes its engagement and dialogue with its Buyers and other community members along with its distribution of Project newsletters. The Panel believes this to be sufficient. By contrast the Panel is not convinced that there has been a similarly robust or adequate consultation with First Nations.

The Panel appreciates that CBP is not a Crown Corporation, but this does not remove the Panel’s obligation to assess the adequacy of CBP’s consultation with First Nations up to the point of this decision. The Panel notes the steps taken by CBP in reaching out to potentially impacted First Nations and acknowledges the lack of response by the First Nations contacted by CBP.

However, the Panel is of the view that the OIB’s lack of response cannot be assumed to equate to the OIB’s comfort or lack of concern with CBP’s Project, thereby leaving potential for issues to emerge at a later point. Notwithstanding CBP’s outreach attempts, the Panel is not satisfied that CBP’s consultation efforts have been similarly vigorous or sustained as those conducted within the Cosens Bay community. The Panel notes that CBP could have demonstrated a greater effort to engage in meaningful dialogue with the OIB and endeavored to get a response. Accordingly, the Panel considers CBP’s First Nations consultation efforts thus far to be inadequate for the Project.

4.0 CONCLUSION

An exemption from regulation should only occur when such an exemption serves the objects and purposes of the UCA and it is in the public interest to do so. The Panel is not persuaded that CBP has met this test for an exemption from the UCA.

⁸³ Exhibit B-2, BCUC IR 6.2.

⁸⁴ Ibid., BCUC IR 6.4, 6.4.1.

⁸⁵ Exhibit B-5, BCUC IR 25.1.

⁸⁶ Exhibit C1-3, BCUC IR 1.3.5.

4.1 Project Alternatives

The Panel acknowledges CBP's desire to provide electrical service to the community of Cosens Bay. While the BCUC is not precluding the potential electrical service, the BCUC must act in the interests of the public and safeguard those interests via oversight and regulation of a public utility service when necessary. In this instance, the Panel recommends that CBP continue to work with BC Hydro in developing a feasible solution. BC Hydro indicates it remains willing to work with CBP to provide service to its community.⁸⁷

4.2 Compliance with the UCA

The Panel acknowledges that should the progression of an electrical service to Cosens Bay in cooperation with BC Hydro be found unworkable, and should CBP continue with the Project alone, then it is required to comply with the UCA as it would be a public utility.

As the Panel is denying CBP's request for an exemption, CBP must comply with section 45 of the UCA if it decides to pursue the Project. CBP must not begin the construction or operation of a public utility system without first obtaining a CPCN from the BCUC. In addition, before any services can be provided and charged to customers, CBP would further require approval of tariffs under sections 59 to 61 of the UCA.

The Panel recommends that due to the complex nature of CBP's Project, that if CBP were to continue alone, then it should apply to the BCUC for a CPCN. **In this event, the Panel directs CBP to produce a plan, including proposed filings and timing, that ensures CBP's compliance with the UCA on a prospective basis. This plan should be prepared in consultation with BCUC staff and must be filed with the BCUC, for approval, prior to CBP commencing any construction of a public utility system.**

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of March 2020.

Original signed by:

T. A. Loski
Panel Chair / Commissioner

Original signed by:

C. Brewer
Commissioner

Original signed by:

W. M. Everett, QC
Commissioner

⁸⁷ BCH Final Argument, p. 1.



ORDER NUMBER

G-71-20

IN THE MATTER OF

the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

CB Powerline Ltd.

Application for an exemption pursuant to section 88(3) of the
Utilities Commission Act

BEFORE:

T. A. Loski, Panel Chair

C. Brewer, Commissioner

W. M. Everett, QC, Commissioner

on March 31, 2020

ORDER

WHEREAS:

- A. On June 13, 2019, CB Powerline Ltd. (CBP) filed an application with the British Columbia Utilities Commission (BCUC) for an exemption from all of Part 3 of the *Utilities Commission Act* (UCA), pursuant to section 88(3) of the UCA, with respect to the proposed provision of electricity to the community of Cosens Bay, Regional District of North Okanagan, British Columbia (Application);
- B. CBP was founded with the purpose of providing electricity supply to the community of Cosens Bay;
- C. CBP intends to apply to the British Columbia Hydro and Power Authority (BC Hydro) for a Primary Service Connection to BC Hydro's 25 kV distribution system. CBP would in turn construct and operate an electricity distribution system to provide year-round electricity supply to the Cosens Bay community;
- D. On July 8, 2019, by Order G-151-19, the BCUC established a written hearing process and a regulatory timetable to review the Application. The regulatory timetable included public notice, intervener registration, one round of information requests and submissions on further process;
- E. BC Hydro and FortisBC Inc. (FBC) registered as interveners;
- F. On October 17, 2019, CBP and FBC made submissions on further process. CBP recommended proceeding to final arguments and FBC made no comment on further process;
- G. By Orders G-253-19 and G-315-19, dated October 23, 2019 and December 5, 2019, respectively, the BCUC amended the regulatory timetable, which included a second round of information requests and arguments;
- H. Final arguments were received from CBP and BC Hydro and FBC in January 2020. CBP filed its reply arguments on February 11, 2020; and

- I. The BCUC has considered the evidence and submissions filed and finds that the following determinations are warranted.

NOW THEREFORE for the reasons outlined in the decision issued concurrently with this order, the BCUC orders as follows:

1. CBP's proposed ownership and operation of a utility for the provision of electricity services to the community of Cosens Bay for compensation would constitute a public utility as defined under the UCA.
2. CBP's application for an exemption pursuant to section 88(3) of the UCA is denied.
3. CBP is to produce a plan, including proposed filings and timing that ensures CBP's compliance with the UCA on a prospective basis. This plan should be prepared in consultation with BCUC staff and must be filed with the BCUC, for approval, prior to CBP commencing any construction of a public utility system that provides electricity to the community of Cosens Bay.

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of March 2020.

BY ORDER

Original signed by:

T. A. Loski
Commissioner

GLOSSARY AND ACRONYMS

| Acronym / Glossary | Description |
|--------------------|--|
| Series 1 Buyers | Buyers who signed expressions of interest in 2017 to participate for their pro rata share of the capital costs of the power line |
| Series 2 Buyers | Series 2 Buyers are landowners who did not execute an expression of interest, but whom have executed the Power Purchase Agreement and Shareholders Agreement prior the Project achieving commercial operation |
| Series 3 Buyers | Series 3 Buyers are landowners who enter into the Power Purchase Agreement and Shareholders Agreement subsequent to the Project achieving commercial operation |
| Application | An application for an exemption from all of Part 3 of the <i>Utilities Commission Act</i> (UCA), pursuant to section 88(3) of the UCA, with respect to the proposed provision of electricity to the community of Cosens Bay, Regional District of North Okanagan, British Columbia |
| BC Hydro | British Columbia Hydro and Power Authority |
| BCUC | British Columbia Utilities Commission |
| Buyers | A person who is defined as a "Buyer" pursuant to a Power Purchase Agreement. Buyers have entered into Power Purchase Agreement with CB Powerline Ltd. |
| CAD | the Consultative Areas Database |
| CBP | CB Powerline Ltd. |
| CPCN | Certificate of Public Convenience and Necessity |
| DND | the Department of National Defence |
| FBC | FortisBC Inc. |
| IR | Information request |
| LGIC | Lieutenant Governor in Council |
| OIC | the Okanagan Indian Band |
| PPA | Power Purchase Agreement |
| Project | CBP intends to apply to BC Hydro for a customer owned Primary Service Connection and to construct and operate a community-specific electricity utility delivery system to Cosens Bay |
| UCA | <i>Utilities Commissions Act</i> |
| UXO | Unexploded ordinance |
| WW | World War |

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

CB Powerline Ltd.

Application for Exemption from Part 3 of the *Utilities Commission Act*, pursuant to section 88(3)

EXHIBIT LIST

| Exhibit No. | Description |
|-----------------------------|---|
| <i>COMMISSION DOCUMENTS</i> | |
| A-1 | Letter dated July 4, 2019 - Appointing the Panel for the review of the CB Powerline Ltd. Application for Exemption from Part 3 of the <i>Utilities Commission Act</i> , pursuant to section 88(3) |
| A-2 | Letter dated July 8, 2019 – BCUC Order G-151-19 establishing the regulatory timetable |
| A-3 | Letter dated August 28, 2019 – BCUC Information Request No. 1 to CBP |
| A-4 | Letter dated October 23, 2019 – BCUC Order G-253-19 establishing a further regulatory timetable |
| A-5 | Letter dated November 21, 2019 – BCUC Information Request No. 1 to BC Hydro |
| A-6 | Letter dated December 5, 2019 – BCUC Order G-315-19 amending the regulatory timetable |
| A-7 | Letter dated December 19, 2019 – BCUC Information Request No. 2 to CBP |
| <i>APPLICANT DOCUMENTS</i> | |
| B-1 | CB POWERLINE LTD. (CBP) – Application for Exemption from Part 3 of the <i>Utilities Commission Act</i> , pursuant to section 88(3) - Letter dated June 13, 2019 submitted by Pinter Electrical Consulting Inc. |
| B-2 | Letter dated October 3, 2019 – CBP Submitting Responses to BCUC Information Request No. 1 |
| B-3 | Letter dated October 3, 2019 – CBP Submitting Responses to FBC Information Request No. 1 |
| B-4 | Letter dated October 17, 2019 – CBP Submission regarding further process |
| B-5 | Letter dated January 16, 2020 – CBP Submitting Responses to BCUC Information Request No. 2 |

INTERVENER DOCUMENTS

- C1-1 **BRITISH COLUMBIA HYDRO AND POWER AUTHORITY (BC HYDRO)** - Letter dated August 9, 2019
Request to Intervene by Fred James
- C1-2 Letter dated December 4, 2019 – BC Hydro Extension Request to file responses to BCUC
Information Request No. 1
- C1-3 Letter dated December 13, 2019 – BC Hydro Submitting Information Request No. 1 to
BCUC
- C2-1 **FORTISBC Inc. (FBC)** - Letter dated August 22, 2019 - Request to Intervene by Doug Slater
- C2-2 Letter dated September 5, 2019 - FBC Information Request No. 1 to CBP
- C2-3 Letter dated October 17, 2019 – FBC Submitting no comment on further process

INTERESTED PARTY DOCUMENTS

- D-1 **SUNELL, G.** – Letter dated August 8, 2019 – Request for Interested Party Status

LETTERS OF COMMENT

- E-1 **FLINTOFF, D.** – Letter of Comment dated October 28, 2019